

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY



COLORADO STATE CAPITOL
200 EAST COLFAX AVENUE SUITE 091
DENVER, COLORADO 80203-1716

TEL: 303-866-2045 FAX: 303-866-4157
EMAIL: OLLS.GA@STATE.CO.US

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MEMORANDUM

TO: Committee on Legal Services

FROM: Brita Darling, Office of Legislative Legal Services

DATE: November 7, 2018

SUBJECT: Rules of the State Board of Human Services, Department of Human Services, concerning Adult Protective Services, 12 CCR 2518-1 (LLS Docket No. 180108 and No. 180218; SOS Tracking No. 2017-00532 and No. 2017-00647).¹

Summary of Problem Identified and Recommendation

Section 26-3.1-101 (10), C.R.S., defines "self-neglect" for article 3.1 of title 26, C.R.S., entitled "Protective Services for Adults at Risk of Mistreatment or Self-neglect". The statute excludes from the definition of "self-neglect" the actions of a "duly authorized surrogate medical decision maker". But the definition of "self-neglect" in Rule 30.100 omits this exclusion. **Because the rule omits a statutory exclusion, we recommend that the definition of "self-neglect" in Rule 30.100 of the rules of the State Board of Human Services not be extended.**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2019, unless the General Assembly acts by bill to postpone such expiration.

Analysis

1. The State Board of Human Services (State Board) omitted from its definition of self-neglect the statutory exclusion for the actions of a duly authorized surrogate medical decision maker.

Section 26-3.1-108 (1), C.R.S., authorizes the Department of Human Services² to promulgate rules concerning adult protective services. This provision reads:

26-3.1-108. Notice of report - appeals - rules. (1) The state department shall promulgate appropriate rules for the implementation of this article 3.1.

Article 3.1 of title 26, C.R.S., creates a process for the reporting and investigation of the mistreatment or self-neglect of an at-risk adult, and for the provision of protective services to identified adults. Behavior that does not meet the statutory definition of mistreatment or self-neglect does not fall within the scope of the article 3.1. Section 26-3.1-101 (10) states:

26-3.1-101. Definitions. As used in this article 3.1, unless the context otherwise requires:

(10) "Self-neglect" means an act or failure to act whereby an at-risk adult substantially endangers his or her health, safety, welfare, or life by not seeking or obtaining services necessary to meet his or her essential human needs. Choice of lifestyle or living arrangements shall not, by itself, be evidence of self-neglect. Refusal of medical treatment, medications, devices, or procedures by an adult **or on behalf of an adult by a duly authorized surrogate medical decision maker** or in accordance with a valid medical directive or order, or as described in a palliative plan of care, shall not be deemed self-neglect. Refusal of food and water in the context of a life-limiting illness shall not, by itself, be evidence of self-neglect. As used in this subsection (10), "medical directive or order" includes, but is not limited to, a medical durable power of attorney, a declaration as to medical treatment executed pursuant to section 15-18-104, C.R.S., a medical orders for scope of treatment form executed pursuant to article 18.7 of title 15, C.R.S., and a CPR directive executed pursuant to article 18.6 of title 15, C.R.S. **(Emphases added)**

² Section 26-1-107 (5)(d) reads in pertinent part, "Whenever a statutory grant of rule-making authority in this title or in title 27, C.R.S., refers to the state department or the department of human services, it shall mean the state department acting through either the state board or the executive director or both."

In promulgating the definition of self-neglect in Rule 30.100, the state board omitted the bolded statutory phrase relating to surrogate medical decision makers.³ Rule 30.100 states in pertinent part:

30.100 DEFINITIONS

The following definitions shall apply to these rules.

“Self-Neglect”, pursuant to Section 26-3.1-101(10), C.R.S., means an act or failure to act whereby an at-risk adult substantially endangers his/her health, safety, welfare, or life by not seeking or obtaining services necessary to meet the adult's essential human needs. **Refusal of medical treatment, medications, devices, or procedures by an adult or in accordance with a valid medical directive or order, or as described in a palliative plan of care, shall not be deemed self-neglect.** Refusal of food and water in the context of a life-limiting illness shall not, by itself, be evidence of self-neglect. “Medical directive or order” includes, but is not limited to, a medical durable power of attorney, a declaration as to medical treatment executed pursuant to Section 15-18-104, C.R.S., a medical orders for scope of treatment form executed pursuant to Article 18.7 of Title 15, C.R.S., and a CPR directive executed pursuant to Article 18.6 of Title 15, C.R.S. In addition to those exceptions identified above, access to Medical Aid in Dying, pursuant to Title 25, Article 48, C.R.S., shall not be considered self-neglect.⁴ **(Emphasis added)**

Excluded from the bolded sentence is the language "**or on behalf of an adult by a duly authorized surrogate medical decision maker**". The bolded language was added to the definition of self-neglect as part of Senate Bill 12-078⁵, which made several changes to adult protective services provisions and added the now-repealed Elder Abuse Task Force to statute. However, the State Board did not update the definition of self-neglect in the State Board's rules at that time to conform to the amended statute.

³ The State Board's definition of "self-neglect" also omitted the sentence relating to "choice of lifestyle or living arrangements" that precedes the bolded sentence, but because identical language is included in another rule, Rule 30.240 E., the omission of the language from the definition was not identified as an issue for purposes of this rule review action.

⁴ The State Board included in its definition of "self-neglect" a reference to the citizen initiative effective December 16, 2016, and codified in article 48 of title 25, C.R.S. While this language may be better referenced elsewhere in the State Board's adult protective services rules, it does not conflict with statute to exclude from the definition of "self-neglect" self-administered medical aid-in-dying medication consistent with the requirements set forth in article 48 of title 25, C.R.S. Therefore, this addition to the definition was not identified as an issue for purposes of this rule review action.

⁵ Senate Bill 17-078, Concerning protections for at-risk adults.

Because a county's jurisdiction to make findings of mistreatment or self-neglect of at-risk adults and to provide protective services is based on the definition of those terms, it is imperative that the State Board's definitions align with state statute. Further, as a county-administered service, it is fair to assume that the State Board's inclusion of the statutory definitions in the rules is intended to provide a single resource for counties to reference when administering the program. Thus, county adult protective services workers are unlikely to notice any discrepancy between the rule definitions and the statutory definitions.

Because the rule omits language included in the statutory definition of "self-neglect" relating to the actions of a duly authorized surrogate medical decision maker and administrators of the program are likely to rely on the language in the rule for their understanding of "self-neglect" and its exclusions, the definition of "self-neglect" in Rule 30.100 should not be extended.

Recommendation

We therefore recommend that the definition of self-neglect in Rule 30.100 of the State Board rules concerning Adult Protective Services not be extended because it omits important language included in the statutory definition.